Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

DAVID A. YALOWIZER and JOE YALOWIZER,
Petitioners,

versus

The TOWN of RANCHESTER, WYOMING, by and through BRAD LANKA, in his official capacity, and by and through the MEMBERS OF THE TOWN COUNCIL, in their official capacity, and the BOARD OF ADJUSTMENT of the Town of Ranchester, by and through its members, in their official capacities,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

C. JOHN COTTON
Cotton Law Offices
222 South Gillette Avenue
Suite 601
Gillette, Wyoming 82716
(307) 682-9887

MARINA TRAMONTOZZI
Counsel of Record
c/o Curry & Taylor
Suite 520
1112 16th Street, N.W.
Washington, D.C. 20036
(202) 393-1070

Attorneys for Petitioners

75 pp

QUESTIONS PRESENTED

This case presents issues which impact not only the fundamental rights of the Petitioners, but of owners of real property and civil rights claimants generally. Supreme Court direction and guidance is needed to clarify the issues presented, and to provide for uniformity in lower court decisions. Petitioners respectfully request that the Court consider and resolve the following questions:

1. What standards should be applied to summary judgment proceedings in equal protection cases in order to preserve the constitutional principles set forth in Village of Willowbrook v. Olech, 528 U. S. 562, (2000)?
2. Does private ownership and historical use of real property located within a town create a protectible property interest under substantive due process analysis, as the Third Circuit has held, or is a protectible property interest created only if the municipal authority has no discretion, per the Tenth Circuit, and under either analysis, do the facts of this case present issues of fact for jury resolution?
3. Is the holding of Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, (June 2000) regarding circumstantial evidence applicable to First Amendment retaliation cases?
4. Under Christiansburg Garment Co., vs. Equal Employment Opportunity Commission 434 US 412 (1978) is a 42 USC § 1983 civil rights action frivolous so as to warrant the assessment of attorney fees to defendants where (a) the action was in accordance with Village of Willowbrook v. Olech, (b) the action was in accordance with law accepted in another federal circuit, (c) the action arises out of disputed facts, and (d) the lower court held that there was a genuine issue of material fact for trial?

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The opinion of the United States Court of Appeals for the Tenth Circuit in *David A. Yalowizer and Joe Yalowizer v. The Town of Ranchester et. al.,* (Tenth Circuit 9/5/01), is set forth in the Appendix hereto at p. 1a. The Order of the Tenth Circuit denying Plaintiff/Appellants' Petition For Rehearing, dated September 28, 2001, is set forth in the Appendix hereto at p. 39a.

The Judgment of the District Court for the District of Wyoming following jury trial on the First Amendment claim, entered October 5, 1999, is set forth in the Appendix hereto at p. 38a. The Order Granting In Part And Denying In Part Summary Judgment of the District Court for the District of Wyoming, entered August 30, 1999, is unreported, and is set forth in the Appendix hereto at p. 27a. The Order Granting Defendants' Motion For Attorney Fees of the District Court for the District of Wyoming, entered June 12, 2000, is unreported, and is set forth in the Appendix hereto at p. 17a.

STATEMENT OF JURISDICTION

The final judgment of the United States Court of Appeals for the Tenth Circuit affirming the decisions of the District Court for the District of Wyoming was entered on September 5, 2001, with Plaintiff/Appellants' Petition For Rehearing denied in an Order dated September 28, 2001. This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

(See Appendix)

STATEMENT OF THE CASE

I. Underlying Facts

This case arises out of actions of Respondents in restricting Petitioners' rights to sell their property with the historic home business intact, and purporting to restrict Petitioners' use of the property.[1] Evidence presented below may be summarized as follows:[2]

(a) Evidence that the Town of Ranchester historically had over 50 home businesses, which the Town allowed to operate without precluding the owners from selling their property with the business intact; Aplt. App. below p. 0404, dep. p. 206, 0424-0427 (see specifically, 0427, dep. page 298-299); 0491-0497, 0500-0503, 0517-0521; 1029-1030; this included a prior meat processing business in an R-3 zone that was never required to have a variance; Id. at 0427, dep. p. 296;

(b) Evidence that, prior to opposing local politicians over paving issues, the Yalowizers operated their home business with the knowledge, approval and patronage of town leaders, with no restrictions on sale of the

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[1] Hereinafter, Petitioners/Appellants will also be referred to as "Yalowizers", and Respondents/Appellees referred to "the Town" or "the Town of Ranchester".

[2] Due to the Circuit Court's conclusion that, in essence, there was no evidence to support Yalowizer's claims, references are made to specific facts as reflected in the record below. Although the citation to the record below is not exhaustive, the citations to page numbers below 1000 generally refer to materials presented on summary judgment, and page numbers above 1000 generally refer to evidence presented at trial.

property; Aplt. App. below p. 0356, 1007-1009, 1014-1017;

(c) Evidence that both Dave Yalowizer and Joe Yalowizer engaged in protected speech in opposing a paving project support by local politicians, including Susan Lee and Brad Lanka; Aplt. App. below p. 0364-0365, 0449-450 (deposition pages 36-37); Aplt. App. below p. 1019-1022;

(d) Evidence that local politician Susan Lee, who was then serving on both the Planning Commission and the Town Council, and was a supporter of the paving project, became upset when Yalowizers exercised their right to speak out against and oppose the paving proposal; Aplt. App. below p. 0364-0365, 1019-1022, 1381-1382.

(e) Evidence that Susan Lee, after becoming upset when Yalowizers exercised their right to speak out against and oppose the first paving proposal; reversed her prior support for the Yalowizer business, and threatened to "have (the Yalowizer business) shut down if (Mr. Yalowizer) didn't sign (Susan Lee's petition supporting the paving)". Aplt. App. below p. 0364-0365, 1019-1022;

(f) Evidence that Defendant Mayor Brad Lanka, who also supported the paving project, became upset when Yalowizers exercised their

right to speak out against and oppose the paving proposal; Aplt. App. below p. 0364-0365; see also 1034-1036;

(g) Evidence that Defendants Mayor Brad Lanka and the Town of Ranchester, after Yalowizers' opposition to the paving project and Susan Lee's complaints about the Yalowizer business, imposed limitations on the Yalowizer business that (1) the business was subject to an arbitrary variance renewal every two years, (it is undisputed that the Town never required any home business owner, other than Yalowizers, to have their home business subject to renewal every two years);and (2) the home business could not be sold, that is, the home could not be sold with the variance intact (it is undisputed that the Town never precluded any home business owner, other than Yalowizers, from selling their property with the home business intact); Exhibit 3-16, Aplt. App. below p. 1440; Aplt. App. below p. 1022-1023, 0404, 0423-0427; 0491-0497, 0500, 0517-0521, 1029-1030;[3]

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[3] The Town contended below that Susan Lee's vote requiring review and precluding the property from being sold with the business intact was evidence that she was not discriminating against Yalowizers. Significantly, Ms. Lee and the Town never required review of any other home business owner, nor did they preclude any other home business owner from selling their property with the home business intact. Contrary to the position taken by the Town, this vote was evidence that Ms. Lee and the Town imposed restrictions on Yalowizers not imposed on others, which restrictions precipitated the property loss suffered by Yalowizers in this case, that is, the loss of the value of the property as a business.

(h) Evidence that the vast majority, if not all, of Yalowizer's adjoining neighbors were in favor of Yalowizers operating a home business "for the purpose of meat processing" with no mention of the restrictions on sale, etc., imposed by the Town Council; Exhibit 3-14, Aplt. App. below p. 1439;

(i) Evidence that, following the Yalowizer's successful opposition to a first general paving proposal, the Town gerrymandered the boundary of the second SID to insure that Yalowizers would be assessed by including the Yalowizers in a paving district where the majority wanted paving; Aplt. App. below p. 0366-0367, 0451, 1024-1026; Ex. 3-9, p. 1420;

(j) Evidence that Defendant Mayor Brad Lanka became embroiled in a personal dispute with Mr. Yalowizer over a paving assessment after the Town passed a second paving proposal which paved the intersection near the Yalowizer residence, and threatened Mr. Yalowizer on two occasions that the Town would "pull his variance" unless Mr. Yalowizer complied with the Town's paving assessment which no one had been able to explain or justify; Aplt. App. below p. 0374 (deposition page 90), 1034-1036;

(k) Evidence that Defendants Mayor Brad Lanka and the Town required Yalowizers to unsuccessfully attempt to jump through a

number of legal and semantical hoops in order to sell the property with the business intact. These included obtaining a "variance", "zoning change", "special exemption", "special exception", etc. Aplt. App. below p. 1150-1151; Of the other 50 plus owners of home based businesses, all of which operated under the liberal interpretation given to the home business exception by the Town, the Town has not been able to identify any which were precluded from selling their homes with the business intact; Aplt. App. below p. 0404, 0423-0427; 0491-0497, 0500, 0511, 0517-0521; 1029-1030;

(l) Evidence that Defendant Mayor Brad Lanka used his influence with the Town Council to instruct them that there was "nothing to vote on" regarding the variance, and that Mr. Yalowizer should be required to sue the Town to get relief; Aplt. App. below p. 0395 (deposition page 168), 1043-1044, 1103, 1246-1247; and

(m) Evidence that Defendant Lanka demonstrated ill will and animosity toward Yalowizers by having "some pretty good words (with Yalowizer) right at the Council meeting in front of the whole Town of Ranchester" over Yalowizers' opposition to the paving proposal (Aplt. App. below p. 364, dep. p. 51-520), later threatened to "pull the variance" (Aplt. App. below p. 1034-1035) and later threatened to "whip (Yalowizers) asses" after arguing over the controversy

between Yalowizers and the Town; Aplt. App. below p. 0394-0395; 0462. Lanka also cast the key vote in ultimately revoking the variance, as there was not enough Town Council members present the night of the vote to form a quorum. Aplt. App. below, p. 0063-0064, Laya Aff., par. 35.

(o) Evidence that Yalowizers later had to sell the property without the business intact, at a reduced value. Aplt. App. below. pp. 0931, 0414, 1041, 1051;

Evidence that the Town's claims that its actions were due to "sanitation issues" were pretextual includes the following:

(a) Evidence that the sanitation excuses were raised by the Town following initiation of litigation; See Dobrenz deposition indicating that the Town Council revoked the variance based on Brad Lanka's representation that it "didn't meet legal requirements", Aplt. App. below, p. 0512; 1459, par. 4;

(b) Evidence that neighboring property owners (who would have been the ones impacted by sanitation issues) overwhelmingly supported Yalowizer's continuation of the business; Aplt. App. below pp. 0637, 0698, 0699; Exhibits 3-14 and 3-48, Aplt. App. below p. 1439 and 1455;

(c) Evidence that the Town of Ranchester had historically allowed meat processing businesses to operate without restricting sale of the property, including the Yalowizers prior to their opposition of the paving and a prior meat processing business in an R-3; Aplt. App. below p. 0356, 0427; 1007-1009, 1014-1017;

(e) Evidence that Town Council Member and Employee Teri Laya testified during the approximate 10 years of operation of the home business, only 3 inquiries had been received regarding sanitation issues. 2 were not even significant enough to contact Yalowizers about. Aplt. App. below, p. 1266. The other involved a minor issue which was never even determined to have originated from the Yalowizer property. Id.; and

(f) While precluding Mr. Yalowizer from selling his property with the business intact, the Town allowed Mr. Yalowizer to continue to operate the business himself. If indeed sanitation was the concern, the Town would have required Mr. Yalowizer to cease operations.

II. Decisions Below

Following the events previously set forth, Yalowizers filed an action in Federal District Court for the District of Wyoming, alleging claims for violation of equal protection, violation of due process and retaliation for the exercise of free speech. On August 30, 1999, following discovery, the

District Court entered an Order Granting In Part And Denying In Part Summary Judgment, granting summary judgment on the equal protection and due process claims, but denying summary judgment on the first amendment claim. (See Appendix, p. 27a). In so doing, the district court stated that "the Court finds that a reasonable jury could conclude" that "Defendants retaliated against Plaintiffs in response to David Yalowizer's opposition to the paving proposal." (See Appendix at p. 35a.) The district court also granted summary judgment against Joe Yalowizer on the first amendment claim, concluding that "Dave Yalowizer made the majority, if not all, of the protected speech." (See Appendix, p. 36a.)

At trial on the first amendment claim, the trial court refused to allow Yalowizers to present evidence and argument regarding the Town's treatment of others, and to compare such treatment with his own, in order to prove retaliation. This included the refusal to allow Yalowizers to present evidence, (1) of how the Town treated others who did not oppose pet political projects; and (2) how the Town treated those who did oppose pet political projects. Following the elimination of the bulk of Plaintiffs' evidence regarding retaliation, the jury returned a defense verdict.

Subsequent to the defense verdict, the Town moved for attorney fees pursuant to 42 USC § 1988. Despite the fact that (a) the action was in accordance with Village of Willowbrook v. Olech, (b) the action was in accordance with law accepted in another federal circuit, (c) the action arose out of disputed facts, and (d) the lower court had held that there was a genuine issue of material fact for trial on summary judgment, the District Court held that the action was frivolous, and awarded over $70,000 in attorney fees against Yalowizers.

Following the adverse results below, Yalowizers appealed to the Tenth Circuit. With regard to the equal protection claim, the Tenth Circuit held that Yalowizers had

not "demonstrated that they were treated differently enough to state a constitutional violation." (See Tenth Circuit decision, Appendix at p. 8a). Without identifying the distinction between being "treated differently" and being "treated differently enough to state a constitutional violation", the Tenth Circuit noted that even the District Court had assumed differential treatment. (See Appendix at p. 7a). The Tenth Circuit then concluded that "plaintiffs did not meet their burden of showing differential treatment", and that "plaintiffs have failed to demonstrate that defendants arbitrarily and capriciously denied their variance or took other action of which they complain." (See Appendix, p. 8a).[4]

With regard to the substantive due process claim,[5] the Tenth Circuit held that "Plaintiffs must show that defendants had limited discretion to deny or revoke their variance", in order to have a protectible property interest. In so doing, the Circuit Court expressly rejected the holding of the Third Circuit in DeBlazio v. Zoning Bd. of Adjustment, 53 F.3d 592, 600-601 (3rd Circuit 1995) that property ownership and intent to use the property in a particular manner are sufficient to establish a protectible property interest. (See Tenth Circuit decision, Appendix p. 7a).

With regard to the lower court determinations excluding evidence of circumstantial evidence on First Amendment retaliation claim, Tenth Circuit held that

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[4] As will be discussed, while giving lip service to summary judgment standards, which require denial of summary judgment if issues of fact are presented, the Tenth Circuit simultaneously ignored the issues of fact inherent in the facts of the case, and essentially made a factual determination on the merits that "plaintiffs did not meet their burden". The net effect was of the Circuit Court decision was to refuse to apply and follow the holding of this Court regarding equal protection as set forth in Village of Willowbrook v. Olech, 528 U.S. 562, (2000).

[5] Yalowizers appealed the decision on the substantive due process claim, but did not appeal the decision on procedural due process.

exclusion of evidence of how the Town treated others who did not oppose pet political projects, was proper. The Tenth Circuit concluded that "this evidence (is) irrelevant to his retaliation claim because David was allowed to run his home business even after his variance had been revoked". (See Tenth Circuit, Appendix at p. 10a).[6]

With regard to the lower court exclusion of evidence of how the Town treated those who did oppose pet political projects, the Tenth Circuit conceded the Yalowizer's evidence "may . . . also have some legitimate value as he contends", but held that the lower court's decision excluding the evidence was not an abuse of discretion. (See Tenth Circuit decision, Appendix at p. 11a).

Finally, inconsistent with the legal and factual issues inherent in the case, and inconsistent with its own conclusion that evidence offered but excluded "may . . . also have some legitimate value as (Yalowizer) contends", the Tenth Circuit held that there was no evidence in support of Yalowizer's claims, and affirmed the lower court ruling that the action was frivolous, and affirmed the award of attorney fees. (See Tenth Circuit decision, Appendix at p. 13a-14a).

Following the September 5, 2001 Order of the Tenth Circuit, Yalowizers filed a Petition For Rehearing, directed primarily toward the attorney fee issue. In an Order dated

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[6] As will be discussed, this analysis ignores the critical facts that no other property owners were (1) precluded from selling their homes with the business intact, (2) subjected to an arbitrary variance "review" every two years, (3) informed that their "variance" to operate a home business had been revoked, or (4) informed that they could only operate without a variance until legal proceedings were resolved. Exclusion of evidence of the Town's treatment of treatment of others, and hence denial of opportunity to compare such treatment with his own, was not only relevant, it was critical to Plaintiff's case.

September 28, 2001, the Petition was summarily denied. This Petition timely follows.[7]

REASONS FOR GRANTING THE WRIT

I. There is a need for Supreme Court clarification of standards to be applied in summary judgment proceedings in equal protection cases in order to preserve the constitutional principles set forth in Village of Willowbrook v. Olech, 528 U. S. 562, (2000).

Ownership of and the right to use and sell real property is without question one of the most important property based rights enjoyed under the United States Constitution. Yet, as illustrated by the decision below, there is a risk that application of constitutional principles to such rights may be thwarted, absent clarification from the Supreme Court.

In Village of Willowbrook vs. Olech, 120 S. Ct. 1073 (2000), the Supreme Court affirmed that "the purpose of the equal protection clause of the Fourteenth Amendment is to

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[7] Part of the reason for filing the Petition for Rehearing was to insure that there was no question but that the Tenth Circuit had very specific citations to summary judgment material. As the appeal involved an appeal from summary judgment and an appeal following trial, the original briefing before the Tenth Circuit contained references to both. In the September 5, 2001 decision, the Tenth Circuit stated that "record citations are largely to trial testimony". In addition, the September 5, 2001 Order states that "plaintiffs violated 10th Cir. R. 10.3(D)(2) by failing to include copies of the summary judgment briefs in the appendix they submitted", which the Circuit Court states "might have provided a road map." See Sept. 5, 2001 Order, footnote 2, at Appendix p. 15a. Plaintiffs read the rule indicated, which references "relevant portions of affidavits, depositions and other supporting documents" as requiring factual material. The Petition for Rehearing was filed with specific dual reference to both summary judgment and trial material to insure that any concerns regarding specific references were addressed.

secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." See Olech at 1074 to 1075, citations omitted. Facts alleged by plaintiffs which the Olech court held were sufficient to state a claim for violation of equal protection were that the Village of Willowbrook initially conditioned Olechs' connection to the municipal water supply on Olechs granting the Village a 33' easement, compared to the 15' easement required of other property owners. After a short delay of 3 months, the Village recanted, and agreed to provide water service with only a 15' easement.

The Olech Court held that allegations that the "Village's demand was 'irrational and wholly arbitrary' and that the Village ultimately connected (the) property after receiving a clearly adequate 15 foot easement" are, "quite apart from the Village's subjective motivation, . . . sufficient to state a claim for relief under traditional equal protection analysis." Justice Breyer, concurring in the result, expressed the opinion that the existence of "vindictive action" or "ill will" was "sufficient to minimize any concern about transforming run of the mill zoning cases into cases of constitutional right." *Id.*,. at 1075.

In this case, in rejecting an equal protection claim under facts arguably more compelling than alleged in Olech, he Circuit Court gave lip service to normal summary judgment standards, but in reality made determinations of fact, ignored other issues of fact, and placed the burden inappropriately on Yalowizers. Further , the Circuit Court created artificial distinctions between equal protection plaintiffs being "treated differently" and "being treated differently enough to state a constitutional violation." See September 5, 2001 Order, p. 9.

An example of the Circuit Court inappropriately placing the burden on summary judgment on Yalowizers, making determinations of fact, and ignoring issues of fact involves the Circuit Court determination that Yalowizers "have not demonstrated that they were treated differently enough to state a constitutional violation." Id. By the language used, it is clear that the Circuit Court inappropriately imposed the burden on Yalowizers on summary judgment, rather than on Defendants to prove the absence of a genuine issue of material fact.[8] Further, as basis for the conclusion that Yalowizers "have not demonstrated that they were treated differently enough to state a constitutional violation", the Circuit Court concluded that "(b)ut as to the most critical aspect of defendants' treatment of them, defendants never prevented (Yalowizers) from operating their meat processing business, regardless of whether they had a variance." (See September 5, 2001 Order, Appendix, p. 8a).

This conclusion is, itself, a determination of disputed facts for a number of reasons. First, "the most critical aspect

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[8] Under its own case law, not in reality applied by the Circuit Court in this case, the grant of summary judgment is reviewed de novo, applying the same standard applied by the district court. The factual record is construed and reasonable inferences therefrom drawn in the light most favorable to the nonmoving party. When reviewing a grant of summary judgment, the district court's conclusions of law are reviewed de novo. Perry v. Woodward, 199 F.3d 1126, 1131 (10th Cir. 1999), citations omitted. The movant has the burden of establishing that it is entitled to summary judgment. Bell v. Dillard Department Stores, Inc., 85 F.3d 1451 (10th Cir. 1996). On summary judgment, the evidence of non-moving party is to be accepted as true. Copple v. City of Concordia, D. Kan 1993, 814 F. Supp 1529. Factual inferences tending to show triable issues of fact should be viewed in the light most favorable to the existence of such issues. Harsha v. U.S. 590 F. 2d 884 (10th Cir. 1979). Where different ultimate inferences may be drawn from the facts contained in the record, the inferences must be viewed in the light most favorable to the party opposing summary judgment. Williams v. Borden, Inc., 637 F. 2d 731 (10th Cir. 1980).

of defendants' treatment" of Yalowizers was the limitation which, as written and as applied, precluded sale of the residence with the business intact. It is undisputed that this limitation was not imposed on anyone else. Second, contrary to the Circuit Court's conclusion, the Town indirectly and directly indicated to Yalowizers that they needed variance to operate. For example, at the same meeting where the Yalowizer variance was initially discussed, another homeowner (Mr. Brown) asked if he needed a variance. While Mr. Yalowizer was informed that he needed a variance, Mr. Brown was informed that he did not. See Appellant's Appendix below at 0637. Further, Mr. Yalowizer was warned by Defendant Lanka on several occasions that he was "just operating on a variance" and that the Town would "pull the variance". See facts discussed, supra. Further, at the June 9, 1998, Council Meeting, where the Yalowizer variance was revoked, the Council Meeting notes state that "the current variance that had been issued to Dave Yalowizer in July of 1997, does not meet specific requirements" and that "by (the Town) making the decision at this time Mr. Yalowizer would have time to come before the Planning Commission with a request for a temporary use permit." See Record below, Appellant App. at 0724. The obvious inference is that Yalowizers needed a variance of some type if they wanted to continue to operate the home business.

Third, also contrary to the Circuit Court's conclusion, if indeed the Defendants never intended that Yalowizers or prospective purchasers of the Yalowizer property need a variance in order to operate the home business, then Yalowizers were treated substantially differently through the Town's actions in (1) requiring Yalowizers to obtain a variance when no other home based business was required to have one; (2) precluding Yalowizers from selling their home with the home business in tact when no one else had such a limitation; (3) requiring the Yalowizers' to be subjected to a

standardless review every two years when no one else was required to have such a review; and (4) ultimately revoking the original variance because the Town had not complied with legal requirements in the first place. If an equal protection claim existed in Olech where the Village initially requested a 33' variance, then after 3 months relented and allowed a 15' variance, the Town's conduct in this case clearly provides the basis for an equal protection claim.

Finally, in accordance with the facts previously discussed, the most critical aspect of Defendants' treatment of Yalowizers involves the initial requirement to have a variance and the limitations included in the variance; i.e., the fact that Yalowizers could not sell their property with the business intact, and were subjected to standardless review, while no other home business owners had these limitations.[9] This well established fact was simply ignored by the Circuit Court.

Another example of the Circuit Court inappropriately placing the burden on summary judgment on Yalowizers, making determinations of fact, and ignoring issues of fact, involves the Circuit Court determination that Yalowizers "have failed to demonstrate that defendants arbitrarily and capriciously denied their variance or took other action of which they complain." (See Sept. 5, 2001 Order, Appendix at p. 8a). In making this determination, the Circuit Court simply ignores the fact that (1) a variance with limitations was imposed upon Yalowizers, (2) Yalowizers were prevented from selling their property with the business intact,

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[9] In addition, The Tenth Circuit also references "the only other two variances noted in the record" which have it then compares to Mr. Yalowizer's variances. See Sept. 5, 2001 Order, p. 10, Appendix at p. 8a. The Tenth Circuit does not reveal that these variances did not even involve home owned businesses, as no other home owned businesses were even required to have a variance. The Tenth Circuit likewise ignores the fact that neither of these non home business variances contained any limitation on sale.

and (3) Yalowizers were subjected to standardless review and ultimate revocation of the variance, while none of the other 50 some home businesses had these limitations. Further, in finding that Yalowizers "failed to demonstrate" arbitrary and capricious conduct, the Circuit Court clearly made factual determinations. (See September 5, 2001 Order, Appendix, p. 9a.)[10]

In Village of Willowbrook vs. Olech, the Court held that "the purpose of the equal protection clause . . . is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of the statute or by its improper execution through duly constituted agents". *Id.* Yalowizers respectfully submit that the net result of the Circuit Court decision in this case has been to neutralize the application and effect of the equal protection principles stated in Olech. Yalowizers respectfully submit that Certiorari should be granted in this case to confirm the holding in Olech and to clarify standards to be applied in summary judgment proceedings in equal protection cases.

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[10] As discussed previously, the record was presented and cited to the Circuit Court, both on initial summary judgment pleadings as well as on the Petition for Rehearing.

II. In a decision conflicting with the Third Circuit ruling in DeBlasio v. Zoning Board, 53 F.3d 592, (3rd Cir. 1995), cert. den. 516 U.S. 937, the Circuit Court improperly concluded that private ownership and historical use of real property located within a town does not create a protectible property interest under substantive due process analysis.

In the September 5, 2001 Order, the Tenth Circuit Court held that the Yalowizers had no protectible property interest in their property because Defendants had "discretion" with regard to action taken concerning the property. (See Sept. 5, 2001 Order, Appendix at p. 6a-7a). In dismissing the substantive due process claim on this ground, the Tenth Circuit expressly rejected the holding of DeBlasio v. Zoning Board, 53 F.3d 592, (3rd Cir. 1995), cert. den. 516 U.S. 937.[11] In DeBlasio, citing Bello v. Walker, 840 F. 2d 1124, (3rd Cir. 1988), the Third Circuit stated:

> "We think it consistent with Bello to conclude that ownership is a property interest worthy of substantive due process protection. (citations omitted) Indeed, one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership. Thus, in the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of

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[11] Illustrating the need for Supreme Court guidance, the DeBlasio court stated that "(s)ubstantive due process is an area of the law 'famous for its controversy, and not known for its simplicity.' (citation omitted). Our substantive due process inquiry is rendered even more difficult by the paucity of Supreme Court guidance." Id. at 598.

> property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached. Where the plaintiff so alleges, the plaintiff has, as a matter of law, impliedly established possession of a property interest worthy of substantive due process protection."

DeBlasio at 600 to 601, emphasis supplied.

Applying those principles, DeBlasio held that a genuine issue of material fact was presented "as to whether the (defendants') decisions were influenced" by personal interests. Id. at 602. Explaining its decision, DeBlasio referenced Bello as follows:

> "(In Bello) (w)e reversed the district court's grant of summary judgment in connection with the plaintiffs' substantive due process claims. We explained in this regard, after canvassing the recent Supreme Court jurisprudence in the area, that "the deliberate and arbitrary abuse of government power violates an individual's right to substantive due process." *Id.* at 1129. We found that the plaintiffs presented evidence from which a fact-finder could reasonably conclude that certain council members "improperly interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits." *Id.* at 1129.

> These actions can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation actionable under section 1983. While the defendants claim that the building permit was denied because of plaintiffs' failure to build in numerical sequence, thus presenting an arguably rational ground for the denial of the permit, it is the factfinders' role to resolve this factual dispute. *Id.* at 1129-30.

See DeBlasio, pp. 559-600, emphasis supplied.

In this case, under facts much more egregious than those alleged in DeBlasio, the Tenth Circuit held that Yalowizers had no protectible property interest in their property because Defendants had "discretion" with regard to action taken concerning the property. The Tenth Circuit ruling, in effect, renders substantive due process under the United States Constitution dependent on state law grant of discretion to governing bodies, and, in essence, a nullity.

Under the Tenth Circuit analysis, a state or local government can avoid application of federal constitutional substantive due process principles by simply having no standards to govern decisions, and hence wide discretion. For example, in this case, the "variance" initially issued by the Town had two limitations. First, it stated that the Yalowizers could not sell the property with the variance intact. Even though virtually every authority addressing the topic has held that limitations established for variances must relate to the land rather than to the identity of the person who owns the land, because there were no state or local "standards" on the subject, the Tenth Circuit concluded that

the Town had "discretion" in this regard. [12] Second, the variance stated it would come up for review every two years, with no standards or limitations upon review. Again, because there were no state or local "standards" on the subject, the Tenth Circuit concluded that the Town had wide "discretion" with regard to the reasons or lack of reasons for ultimate revocation of the variance.

Yalowizers respectfully submit that federal substantive due process protections are even more important and necessary where the decision making authority has wide or unlimited discretion, not less. Petitions respectfully request that the Supreme Court address and resolve this important issue.

III. The principles of Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, (June 2000) regarding circumstantial evidence should apply to First Amendment retaliation cases

The threshold issue in virtually every property use case raising issues of constitutional violations is the extent to which the plaintiffs have been treated differently than others. See Olech, and DeBlasio, supra. See also Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, (June 2000) and Esmail v. Macrane, 53 F.3d 176, (7th Cir. 1995). Reeves addressed issues regarding the evidentiary burden borne by plaintiffs who attempt to prove discrimination, and

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[12] It is well settled that limitations established for variances must relate to the land rather than to the identity of the person who owns the land. See 83 Am.Jur.2d Zoning and Planning § 935, note 79, citing Wentworth Hotel, Inc., vs. New Castle, 112 NH 21, 287 A2d 615. See also Wentworth at page 27, citing 71 R.I. 303, 44 A.2d 720 (1945); State ex-rel. Parker vs. Konopka, 119 Ohio App. 513, 200 N.E.2d 695 (1963); Montgomery County vs. Mossburg, 228 Md. 555, 180 A.2d 851 (1961). Accordingly, even under its' the Tenth Circuit's own analysis, there was no discretion for the action taken by Defendants.

noted that discrimination may be proven through circumstantial evidence. 120 S. Ct. 2097, 2105, 2108-2109.

In a case such as the one tried, there are a very limited number of ways to show that Defendants discriminated and/or retaliated against Plaintiffs for Plaintiffs' exercise of First Amendment rights in opposing the paving project. One is by evidence of how Defendants treated others who did not opposed pet projects, and comparison of that conduct with Defendants' treatment of plaintiffs. A second is to show how the Town treated those who did oppose pet projects, and comparison of that conduct with Defendants' treatment of plaintiffs. Unfortunately, Plaintiffs were not allowed to present available evidence in either of these areas.

With regard to the first area, the Tenth Circuit concluded that "(t)he (district) court found this evidence to be irrelevant to (the) retaliation claim because David was also allowed to run his home business even after his variance had been revoked." In accordance with prior discussions, this ruling ignores the fact that (1) the Defendants had imposed the variance, which was not imposed on anyone else, under circumstances demonstrating intent not to allow Yalowizers to operate without a variance; (2) Yalowizers were precluded from selling their property with the variance intact, a restriction undeniably not imposed on any other home business; and (3) Yalowizers were subjected to a standardless review every two years, a restriction undeniably not imposed on any other home business.

With regard to the second area, while conceding that "David's proffered evidence may . . . have some legitimate value as he contends" the Tenth Circuit affirmed the district court decision excluding the evidence. See September 5, 2001 Order, p. 13.

In accordance with Reeves, a civil rights plaintiff is entitled to introduce circumstantial evidence to prove discrimination. The decision of the trial court, as affirmed by

the Tenth Circuit, precluded Yalowizers from introducing and relying on such circumstantial evidence. Given that retaliation is rarely admitted, and rarely provable by direct evidence, the refusal to allow circumstantial evidence in this case was critical to the case, and an abuse of discretion.

Petitioners respectfully request that certiorari be granted on this issue in order to address and resolve the question of whether the Reeves decision regarding admissibility of circumstantial evidence is applicable in First Amendment retaliation cases.

IV. Contrary to Christiansburg Garment Co., vs. Equal Employment Opportunity Commission 434 US 412 (1978), the Circuit Court improperly held that a 42 USC § 1983 action was frivolous so as to warrant the assessment of attorney fees to defendants where (a) the action was in accordance with Village of Willowbrook v. Olech, (b) the action was in accordance with law accepted in another federal circuit, (c) the action arose out of disputed facts, and (d) the lower court held that there was a genuine issue of material fact for trial.

In Christiansburg Garment Co., vs. Equal Employment Opportunity Commission 434 US 412 (1978), the Court described the limited circumstances under which attorney fees should be assessed against ¤ 1983 plaintiffs:

> " (I)t is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for

> seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictible. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.
>
> * * * To (assess) . . . attorney fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inherent in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the (Civil Rights Act)". Hence, a plaintiff should not be assessed his opponent's attorney fees unless a court finds that his claim was frivolous, unreasonable, or groundless . . . ." Id., 434 US at 422, emphasis supplied.

The decision of the Tenth Circuit Court affirming the award of attorney fees is contrary to the language and intent of Christiansburg, and illustrates the need for further Supreme Court guidance in this area. In this case, the equal protection claim in the underlying action was in accordance with the equal protection law promulgated by the United States Supreme Court in Village of Willowbrook vs. Olech.[13]

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[13] At the time the action was filed, the Seventh Circuit had rendered the underlying decision, which was later affirmed by the Supreme Court. The Seventh Circuit decision was part of the body of law reviewed later on in connection with the litigation.

The due process claim was in accordance with the DeBlasio decision, as previously discussed. The action arose out of facts and factual inferences which can only be described as disputed. At the summary judgment stage, the district court held that there was a genuine issue of material fact for trial. Critical evidentiary decisions were made at the trial stage regarding admission of evidence which undeniably impacted the case. Further, as previously discussed, even the Tenth Circuit recognized that there was merit to evidence which was offered by the Yalowizers, but rejected by the district court.

Under the background of this case, it is clear that the district court and the Tenth Circuit Court engaged in the "*post hoc* reasoning" which Christiansburg warned against. With regard to attorney fees for the period prior to summary judgment, the Tenth Circuit's affirmation of the fee award is based upon a one sentence finding that "the claims failed at the most rudimentary (summary judgment) stages". See September 5, 2001, Order, page 16. In other words, since the Yalowizer's equal protection and due process claims were rejected on summary judgment "the action must have been unreasonable or without foundation". The implication is that, if claims fail on a motion to dismiss or on summary judgment, award of attorney fees to defendants is appropriate. This is precisely what Christiansburg held should not happen, and will have the effect of thwarting the purposes of the civil rights act, unduly punishing civil rights plaintiffs, and chilling potentially meritorious claims.[14]

With regard to the claims where the district court held there was a genuine issue of material fact, and which went to trial, the Tenth Circuit indicated that it was a "somewhat closer question". See September 5, 2001, Order, page 16. The Tenth Circuit then affirmed the award of attorney fees

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[14] As previously discussed, Yalowizers do not believe that the claims should have failed on summary judgment.

because it agreed "with the district court that David presented no evidence of retaliation (other than his personal speculation) and that even if he did, he did not present a colorable argument to overcome the . . . defense (that Defendants would have taken the same action regardless of the protected speech)". See September 5, 2001, Order, page 17. In reaching this conclusion, the Tenth Circuit not only ignored the evidence previously summarized, which was before it in detail, but also ignored the holding of the United States Supreme Court in Reeves vs. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097 (2000). As previously discussed, Reeves recognized that discrimination may be proven through circumstantial evidence. 120 S. Ct. 2097, 2105, 2108-2109. Discussing the inferences associated with evidence that reasons given by a defendant for its conduct are pretextual, Reeves stated:

> "Proof that the defendants' explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. (citations omitted) . . . . (T)he trier of fact can reasonably infer from the falsity of the explanation that the (defendant) is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Wright v. West*, 505 U.S. 277, 296, 112 S. Ct. 2482, 120 L.Ed.2d 225 (1992); see also *Wilson v. United States*, 162 U.S. 613, 620- 621, 16 S. Ct. 895, 40 L.Ed. 1090 (1896); 2 J. Wigmore, Evidence § 278(2), p. 133 (J. Chadbourn rev. ed.1979)."

Reeves at 2108-2109, emphasis supplied.

In accordance with facts previously discussed, there was significant evidence that the reasons given by Defendants for their conduct was pretextual. Under Reeves, this would have been sufficient to allow the trier of fact to reject the defense that Defendants would have taken the same action regardless of the protected speech. To impose attorney fees because the jury did not reject the defense is, contrary to Christiansburg, "(t)o (assess) . . . attorney fees against plaintiffs simply because they do not finally prevail".

Petitioners respectfully submit that Certiorari should be granted to clarify Christiansburg, and confirm that the assessment of attorney fees to defendants in an action under 42 USC § 1983 where ((a) the action was in accordance with Village of Willowbrook v. Olech, (b) the action was in accordance with law accepted in another federal circuit, (c) the action arose out of disputed facts, and (d) the lower court held that there was a genuine issue of material fact for trial. Allowing the current decision to stand without review will, in the language of Christiansburg, "substantially add to the risks inherent in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the (Civil Rights Act)", and ultimately deter civil rights plaintiffs with potentially meritorious claims.

CONCLUSION

The issues presented in this case impact not only the fundamental rights of the Yalowizers, but of owners of real property and civil rights claimants generally. Supreme Court direction and guidance is needed to clarify the issues presented, and provide for uniformity in lower court

decisions. Petitioners respectfully request that the Court consider and resolve the questions presented.

Respectfully submitted this 14th, day of November, 2001.

Attorneys For Petitioners:

C. John Cotton
Cotton Law Offices
222 South Gillette Avenue
Suite 601
Gillette, Wyoming 82716
(307) 682-9887

Marina Tramontozzi
Counsel of Record
c/o Curry & Taylor
Suite 520
1112 16th Street, N.W.
Washington, D.C. 20036
(202) 393-1070

(any footnotes trail end of each document)
Nos. 99-8098, 00-8047

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID A. YALOWIZER and JOE YALOWIZER,
Plaintiffs-Appellants,

v.

THE TOWN OF RANCHESTER, WYOMING, by and through BRAD LANKA, in his official capacity and by and through the MEMBERS OF THE TOWN COUNCIL, in their official capacity, and THE TOWN OF RANCHESTER BOARD OF ADJUSTMENT,
Defendants-Appellees.

September 5, 2001, Filed

NOTICE:
RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL:
For DAVID A. YALOWIZER, JOE YALOWIZER, Plaintiffs - Appellants (No. 99-8098): C. John Cotton, Cotton Law Offices, Gillette, WY.

For THE TOWN OF RANCHESTER, WYOMING, by and through BRAD LANKA, in his official capacity and by and through the MEMBERS OF THE TOWN COUNCIL, in their official capacity, and, THE TOWN OF RANCHESTER BOARD OF ADJUSTMENT, Defendants - Appellees (No. 99-8908): Rebecca A. Lewis, Rothgerber, Johnson & Lyons,

Cheyenne, WY. Tom C. Toner, Jay A. Gilbertz, Yonkee & Toner, Sheridan, WY.

For DAVID A. YALOWIZER, JOE YALOWIZER, Plaintiffs - Appellants (No. 00-8047): C. John Cotton, Cotton Law Offices, Gillette, WY.

For TOWN OF RANCHESTER, WYOMING, by and through BRAD LANKA, in his official capacity and by and through the MEMBERS OF THE TOWN COUNCIL, in their official capacity, and, THE TOWN OF RANCHESTER BOARD OF ADJUSTMENT, Defendants - Appellees (No. 00-8047): Rebecca A. Lewis, Rothgerber, Johnson & Lyons, Cheyenne, WY. Tom C. Toner, Jay A. Gilbertz, Yonkee & Toner, Sheridan, WY.

JUDGES:
Before EBEL, PORFILIO, and KELLY, Circuit Judges.

OPINIONBY:
David M. Ebel

OPINION:

ORDER AND JUDGMENT *

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument.

Plaintiffs David and Joe Yalowizer brought this action pursuant to *42 U.S.C. § 1983* claiming that defendants violated their constitutional rights relative to their operation of a meat-processing business in a residential area of the town of Ranchester, Wyoming. In particular, they contend

that defendants violated their rights to equal protection and substantive and procedural due process and improperly retaliated against them for exercising their rights to free speech. The district court granted summary judgment against plaintiffs on their equal protection and due process claims, and a jury returned a verdict against them on their retaliation claim. The district court also awarded defendants their attorney fees under *42 U.S.C. § 1988.* Plaintiffs appeal. For the reasons explained below, we affirm.

I.

Because the basic facts are relevant to the district court's grant of summary judgment, we present them in the light most favorable to plaintiffs. n1 David Yalowizer and his son, Joe, owned residential property in Ranchester that was zoned to allow "home occupations." Apparently sometime before 1995, plaintiffs, primarily David, began operating a meat-processing business at the property as a home occupation, with some assistance from Joe. In 1995, there was a proposal to pave many of the streets in Ranchester, including those around plaintiffs' property, and they opposed the proposal because they could not afford their assessment for the project. After an argument with David regarding the proposal, Susan Lee, a town planning commission member who favored the proposal, told David that she did not think his home occupation complied with town ordinances and said she would try to shut it down if he did not support the proposal. Defendant Brad Lanka, mayor of Ranchester, was also upset by David's opposition to the project. Voters rejected the paving proposal.

Concerned about Lee's opposition to his business, David talked to town representatives who suggested that he obtain a variance to authorize his home occupation. He applied for a variance, and in May 1996, he was granted one with two restrictions: (1) that it would be reviewed every two years at

an advertised public hearing; and (2) that the variance would expire on transfer of ownership of the property.

The town subsequently proposed and approved another, more limited paving project that included streets around plaintiffs' property. David wrote to the town stating that he could not afford his assessment for the project and would not pay it. He also had discussions with defendant Lanka regarding his opinion that his assessment was unfair. In the fall of 1996, Lanka told David that he was operating on just a variance and that if David did not pay the assessment, the town would revoke the variance.

Although the record does not indicate that plaintiffs paid their assessment, they continued to operate their meat-processing business until late 1997, when David needed to sell the property to raise money. David's brother Mike offered to purchase the property for $ 125,000 as long as he could keep operating the meat-processing business. Mike asked the town council to remove the restrictions on the variance so that he could obtain the financing necessary to make the purchase. In February 1998, the town's attorney advised the council that a variance was not the appropriate way to allow Mike to continue the business, but that a special exemption might be more appropriate. Meanwhile, David requested that the property be rezoned for business use and that the restrictions on the variance be removed. These requests were denied, as was the request for a special exemption. In June 1998, the town council revoked the variance on the basis that the "legal requirements" for the variance had not been met. David sold the property in January 1999 for less than Mike had offered.

Rather than pursue an appeal of the council's decision, plaintiffs brought this action asserting that defendants violated their constitutional rights to procedural and substantive due process and equal protection. They also claimed that defendants' actions were retaliation for

expression of their free-speech rights in opposing the paving projects. The district court granted defendants' motion for summary judgment on the due process and equal protection claims and on Joe Yalowizer's retaliation claim. David's retaliation claim proceeded to trial, and the jury returned a defense verdict. The district court granted defendants' motion for their attorney fees including those incurred in conjunction with the trial. In appeal No. 99-8098, plaintiffs challenge the district court's grant of summary judgment on their substantive due process and equal protection claims and on Joe's retaliation claim. They also challenge evidentiary and jury instruction rulings the court made at trial. In appeal No. 00-8047, they appeal the district court's award of attorney fees.

II. No. 99-8098

Before we begin our consideration of plaintiffs' arguments, we have several significant observations. First, throughout the entire time plaintiffs owned the property, and despite whether or not plaintiffs had a variance, defendants never prohibited plaintiffs from operating their meat-processing business. Second, plaintiffs have never succinctly explained in any document submitted to this court what the bases are for their substantive due process and equal protection claims. They recite a series of "bad facts" and then contend defendants violated their rights but without identifying exactly what those rights are, whether they be, for example, the right to operate their home occupation, the right to a variance, the right to transfer a variance, or the right to a special exemption. Third, plaintiffs have not attempted to demonstrate that they qualified for, much less were entitled to, a variance (with or without restrictions), a special exemption, or rezoning. Finally, we note the general rule that "federal courts should be reluctant to interfere in zoning disputes which are local concerns." *Norton v. Vill. of Corrales, 103 F.3d 928, 933 (10th Cir. 1996).*

The district court granted summary judgment on plaintiffs' substantive due process and equal protection claims and on Joe Yalowizer's retaliation claim. We review the court's grant of summary judgment de novo, applying the same standards under Fed. R. Civ. P. 56(c) that the district court used. *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs., 165 F.3d 1321, 1326 (10th Cir. 1999).*

A. Substantive Due Process

The district court rejected plaintiffs' substantive due process claim for two reasons. First, it held that plaintiffs did not have a property right in the variance because it was wholly within the town council's discretion to renew the variance. Second, it found that plaintiffs failed to show invidious discrimination, presence of a suspect class, or infringement of a fundamental interest, or that the town's decision was arbitrary and capricious. We need address only the first reason given by the district court because it is a sufficient basis on which to reject plaintiffs' claim.

To prevail on a substantive due process claim, plaintiffs must establish that defendants' actions deprived them of a protectible property interest, which in this situation means a legitimate claim of entitlement to some benefit. *Hyde Park Co. v. Santa Fe City Council, 226 F.3d 1207, 1210 (10th Cir. 2000).* "In municipal land use regulation cases such as this, the entitlement analysis presents a question of law and focuses on whether there is discretion in the defendants to deny a zoning or other application filed by the plaintiffs." *Id.* (quotation omitted). Plaintiffs must therefore show that defendants had limited discretion to deny or revoke their variance. "Otherwise, [defendants'] decisionmaking lacks sufficient substantive limitations to invoke due process guarantees." *Id.* (quotation omitted).

Plaintiffs fall far short of demonstrating that they had a property interest subject to due-process protections. Indeed, they never specifically identify the property interest of which defendants' actions allegedly deprived them. Assuming the property interest is a variance without restrictions, they fail to identify what standards, for example, a local ordinance or state statute, govern the issuance of variances and fail to show how defendants had limited discretion under these standards to deny them a variance. Plaintiffs have therefore failed to demonstrate that defendants' authority to issue variances is bound by the substantive limitations necessary to invoke due-process guarantees. To the extent that the Third Circuit case on which they rely, *DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 600-01 (3d Cir. 1995),* holds that mere property ownership and the intent to use the property in a particular manner are sufficient to establish a protectible property interest regardless of whether there is a legitimate claim of entitlement to some benefit, we find that case clearly inconsistent with the law of this circuit and unpersuasive.

B. Equal Protection

Plaintiffs contend that defendants violated their rights to equal protection by treating them arbitrarily and capriciously as a "class of one." The Supreme Court has recognized "successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech, 528 U.S. 562, 564, 145 L. Ed. 2d 1060, 120 S. Ct. 1073 (2000)* (per curiam). In analyzing plaintiffs' equal protection claim, the district court assumed that the town council had treated them differently from others similarly situated, but rejected their claim on the ground that defendants had a reasonable basis on which to deny the variance.

The district court was overly generous in assuming differential treatment. Plaintiffs may have been similarly situated to others in town who operated home businesses, but they have not demonstrated that they were treated differently enough to state a constitutional violation. Again, we are hampered by plaintiffs' failure to state explicitly what differential treatment forms the basis for their claim. But as to the most critical aspect of defendants' treatment of them, defendants never prevented them from operating their meat-processing business, regardless of whether they had a variance. In response to their concern about the planning commission member's threat, town representatives suggested that plaintiffs obtain a variance, but defendants never required plaintiffs to obtain a variance to continue their operations. The variance they received contained two restrictions. One stated that it would be reviewed periodically, a restriction similar to that imposed on the only two other variances we noted in the record. *See* Appellants' App., Vol. II at 273-74. The other restriction provided that it would expire on transfer of ownership of the property. Plaintiffs refer to only one other variance they contend was transferable. Not only do they refer to the trial transcript, which is irrelevant for summary judgment purposes, but the relevant exhibit discussed in the transcript is not in the record submitted to us. Moreover, David's attempt to testify regarding this transferable variance was precluded on hearsay and foundation grounds. *See id.*, Vol. V at 1061-63. Finally, plaintiffs have failed to show how they were treated differently in the revocation of the variance, denial of a special exemption, or any other significant dealing with the town. In short, plaintiffs did not meet their burden of showing differential treatment.

But even if, like the district court, we assume differential treatment, plaintiffs have failed to demonstrate that defendants arbitrarily and capriciously denied their variance or took other action of which they complain. Plaintiffs

contend that "there were a whole host of issues regarding ill will and unequal treatment, of which the denial of the variance was just a part." Appellants' Br. at 23. However, this alleged "host of issues" does not demonstrate arbitrary and capricious treatment:

. Although plaintiffs complain about the planning commission member threatening to have their business shut down for opposing the paving project, she voted in favor of their variance.

. Plaintiffs contend that the revised paving proposal was gerrymandered to include them, and to require them to pay a portion of the assessed cost, but they cite no valid summary judgment evidence to support this contention.

. They claim defendants treated them differently from others by requiring them to obtain a variance, placing limitations on it, and then refusing to remove the limits or grant them a special exemption or rezoning, a contention we have already rejected.

. The contend the mayor became "upset" when David opposed the paving proposal, threatened to "pull" plaintiffs' variance because they refused to pay their share of the assessed cost of the paving project, told the town council there was "nothing to vote on" with respect to renewing the variance and threatened to "whip [plaintiffs'] asses." Regardless of whether the mayor's actions were appropriate, they fall far short of mistreatment of a constitutional magnitude.

The district court did not err in granting summary judgment on plaintiffs' equal protection claim.

C. Joe Yalowizer's Retaliation Claim

The district court dismissed Joe's retaliation claim because his claim was based on an alleged violation of his father's free speech right rather than his own. In arguing that the court erred and that defendants retaliated against Joe for his own speech, plaintiffs cite only trial testimony regarding Joe's allegedly protected speech. Because this evidence was not before the district court when it granted summary judgment on this issue, we will not consider it on appeal. We therefore reject this claim of error.

D. Exclusion of Evidence at Trial

David Yalowizer challenges three district court rulings excluding evidence at trial on his retaliation claim. He contends this evidence would have shown how defendants favored those who did not "rock the boat," and mistreated others such as him who did, as well as showing defendants' general ill-will toward him. We review a district court's exclusion of evidence for abuse of discretion. *Cartier v. Jackson, 59 F.3d 1046, 1048 (10th Cir. 1995).*

David first contends that the court abused its discretion by excluding evidence that the town allowed other home businesses to operate without variances. The court found this evidence irrelevant to his retaliation claim because David was also allowed to run his home business even after his variance had been revoked. The evidence therefore did not show that he was treated differently from other home business operators. We agree there was little relevance to this evidence and see no error in its exclusion.

David next contends that the court erred by not allowing him to present evidence that defendants threatened to revoke the variance of another resident who operated a business who had opposed some unspecified proposition advanced by the town. He contends he offered this evidence pursuant to Fed. R. Evid. 404(b) to show "'motive, opportunity, (and) intent.'" Appellant's Br. at 28 (quoting Rule 404(b)). The district court

excluded the evidence as barred by Rule 404(b)'s provision that evidence of other wrongs "is not admissible to prove the character of a person to show action in conformity therewith." *See Coletti v. Cudd Pressure Control, 165 F.3d 767, 776 (10th Cir. 1999)* (noting that the basis for Rule 404(b)'s exclusion of evidence of other wrongs is that "such evidence is of slight probative value yet very prejudicial"). While David's proffered evidence may also have some legitimate value as he contends, we see no error in the court's viewing it as it did and excluding it.

Finally, David contends that the court should not have excluded evidence that defendant Lanka called plaintiffs out into the street from a bar and told them he was going to "whip (their) asses." He contends this would have shown Lanka's animosity toward plaintiffs. Despite the court's granting of defendants' motion in limine excluding this evidence, David testified regarding this incident, and the court did not strike the testimony. We thus find this claim of error unpersuasive.

E. Jury Instructions

The district court instructed the jury that

in order for Mr. Yalowizer to prove that his speech in opposition to the paving district was a substantial or motivating factor in the Town's decision not to withdraw or modify the limitations in the variance or in the Town's decision not to renew the variance, Mr. Yalowizer must prove by a preponderance of the evidence that a majority of the governing body of the Town of Ranchester acted with the improper motive to punish Mr. Yalowizer for his speech.

Appellants' Br, Att. 4, Inst. 17. David argues that the district court erred by refusing to instruct the jury essentially that the

town could be liable based on the actions of Mayor Lanka if those actions reflected official town policy or if the town had delegated relevant decision-making authority to him.

We review a district court's decision not to give a requested jury instruction for an abuse of discretion, but review the instructions as a whole de novo to determine whether they correctly and adequately stated the governing law. *Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1152 (10th Cir. 1999).* David contends that the court was compelled to give the requested instructions by *McMillian v. Monroe County, Ala., 520 U.S. 781, 138 L. Ed. 2d 1, 117 S. Ct. 1734 (1997),* and *Ware v. Unified Sch. Dist. No. 492, 902 F.2d 815 (10th Cir. 1990).* Relevant to this issue, these cases state only the unremarkable proposition that, for § 1983 claims, "a governmental body will only be held liable for the results of decisions made by the final policymaker, as defined by state law." *Ware, 902 F.2d at 817; McMillian, 520 U.S. at 785-86.* While final decisionmaking authority may be delegated, *Ware, 902 F.2d at 817,* the record clearly contains insufficient evidence to support David's contention that the town council had delegated its final decisionmaking authority regarding David's variance and related matters to Mayor Lanka. We also see no error in the court's refusal to give a requested instruction based on Wyo. Stat. Ann. § 15-1-108(a)(ii), which provides that the mayor shall have "superintending control of all officers and affairs of the city or town." Like the district court, we do not interpret this statute as giving final decision-making authority on all town issues to the mayor.

III. No. 00-8047

Following grant of the summary judgments and the jury verdict in defendants' favor, defendants moved for their attorney fees under *42 U.S.C. § 1988.* The district court recognized the rarity of attorney fee awards to successful civil rights defendants, especially when a claim has

proceeded to trial. Nonetheless, it concluded that plaintiffs' claims were frivolous, and it found that defendants' claimed fees totaling $ 70,906.06 were fair and reasonable. It determined that plaintiffs would be jointly and severally liable for defendants' fees incurred up to the time summary judgment was granted, at which time Joe was dismissed from the case, and that David would be liable for the remainder. On appeal, plaintiffs challenge generally the award of fees, though they do not challenge the court's particularized determination that the fees claimed were fair and reasonable.

A prevailing defendant in a civil rights action may recover attorney fees only if the suit was vexatious, frivolous, or brought to harass or embarrass the defendant. This is a difficult standard to meet, to the point that rarely will a case be sufficiently frivolous to justify imposing attorney fees on the plaintiff." *Mitchell v. City of Moore, Okla., 218 F.3d 1190, 1203 (10th Cir. 2000)* (quotations and citations omitted). We review the district court's decision to award attorney fees for an abuse of discretion, but review de novo the district court's application of the legal principles underlying that decision. *Nat'l Ass'n of Prof'l Baseball Leagues, Inc. v. Very Minor Leagues, Inc., 223 F.3d 1143, 1146 (10th Cir. 2000).*

Turning first to the award of fees with respect to the claims on which the court granted summary judgment, we see no error in the court's implicit finding that these claims were frivolous. n2 As is evident from our earlier discussion of these claims, plaintiffs did not present close or novel issues--the claims failed at the most rudimentary stages--and they have not demonstrated that the court abused its discretion by finding them frivolous.

Determining whether the retaliation claim that survived summary judgment and proceeded to trial was frivolous presents a somewhat closer question. Nonetheless, an award of fees in such situations is not prohibited. *See Flowers v.*

Jefferson Hosp. Ass'n, 49 F.3d 391, 392-93 (8th Cir. 1995); Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). The district court had noted in denying defendants' summary judgment motion on this issue that plaintiffs' evidence of retaliation was weak, and it concluded following trial that this claim was founded solely on David's speculation that defendants had retaliated against him. The court also found the claim frivolous because of David's inability to overcome defendants' affirmative defense that they would have taken the same action regardless of David's speech opposing the paving projects. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-87, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977).* Perhaps the court should have granted summary judgment on the retaliation claim; that issue, however, is not before us. But we have reviewed the trial transcript and agree with the district court that David presented no evidence of retaliation (other than his personal speculation), and that even if he did, he did not present a colorable argument to overcome the *Mt. Healthy* defense. Although awarding fees to defendants in civil rights case is, and should be, rare, we cannot say that the district court abused its discretion in determining that the retaliation claim was frivolous. We therefore affirm the award of fees.

The judgments of the district court on the merits and on attorney fees are AFFIRMED.

Entered for the Court

David M. Ebel

Circuit Judge

----------Footnotes----------

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

n1 In so doing, we are generally limited to those facts as recited by the district court because plaintiffs have improperly cited the record in their briefs and have violated this court's rules in submitting their appendix. Record citations in their brief are largely to trial testimony. The district court obviously did not have trial testimony before it when considering defendants' summary judgment motion, and plaintiffs did not move for reconsideration of the court's summary judgment decision after presenting their trial evidence. We therefore will not consider this evidence in reviewing the court's grant of summary judgment. *Magnum Foods, Inc. v. Continental Cas. Co., 36 F.3d 1491, 1502 n.12 (10th Cir. 1994).* Additionally, plaintiffs violated 10th Cir. R. 10.3(D)(2) by failing to include copies of the summary judgment briefs in the appendix they submitted. Thus, to the extent their summary judgment brief might have provided a road map to the voluminous summary judgment evidence plaintiffs submitted, we are left stranded, and we will not sift through the record to determine what factual assertions plaintiffs make are supported by summary judgment evidence. *See SEC v. Thomas, 965 F.2d 825, 827 (10th Cir. 1992).* Neither party contends the district court inaccurately presented the facts for summary judgment purposes.

n2 The court's order awarding fees discussed the frivolousness of only the retaliation claim that went to trial, and not the other claims on which the court granted summary

judgment. Without much argument, plaintiffs challenge the court's apparently implicit findings that these claims were also frivolous, though they do not object to the court's failure to explain its reasoning on the record. While the court should have stated its reasoning explicitly, in this situation we do not find its failure to do so to be reversible error.

Case No. 98-CV-1063-B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

DAVID A. YALOWIZER and JOE YALOWIZER
Plaintiffs,

vs.

BRAD LANKA, individually, The TOWN OF RANCHESTER, WYOMING, by and through BRAD LANKA, in his official capacity, and by and through the MEMBERS OF THE TOWN COUNCIL, in their official capacity, and the BOARD OF ADJUSTMENT of the Town of Ranchester, by and through its members, in their official capacities,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR ATTORNEY FEES

This matter comes before the Court on Defendants' Motion for Attorneys Fees Pursuant to 42 U.S.C. §1988, brought after they prevailed in Plaintiffs' lawsuit which had claimed that Defendants violated Plaintiffs' civil rights in refusing to grand David Yalowizer the right, in perpetuity, to operate a meat processing facility at his Ranchester, Wyoming residence. After reading the briefs, hearing oral arguments, and being fully advised in the premises, the Court FINDS and ORDERS as follows:

Background

In early 1996, the Town of Ranchester, Wyoming (the "Town") was embroiled in a controversy regarding paving. The citizens of Ranchester were debating a special

improvement district, labeled SID Nº 4, which provided for the paving of the streets in an area including Plaintiff David Yalowizer's property. A previous incarnation of SID Nº 4 had failed to garner a majority vote of affected citizens, and Mr. Yalowizer's outspoken opposition to the paving plan contributed significantly to its defeat. Mr. Yalowizer also wrote a letter objecting to the new SID Nº 4.

Mr. Yalowizer operated a meat processing business in a residential section of Ranchester Wyoming (the "Town.") He sought the Town's blessing for his meat processing operation and, on May 7, 1996, despite his opposition to SID Nº 4, was granted a variance that allowed the meat business but required the variance to be reviewed every two years and provided for expiration of the variance upon transfer of the property.

In June of 1996, the revised SID No *4* came to a vote of the Town Council and was passed. The Town engineer prepared an assessment role and notified affected property owners of their assessment amounts. Mr. Yalowizer complained that he could not afford the assessment and ultimately refused to pay it. At the behest of the Town Council, the Town's mayor, Brad Lanka, went to Mr. Yalowizer's residence to discuss the delinquent assessment payments. The conversation became heated and the parties discussed the fact that Mr. Yalowizer's business was operating under only a variance.

In early 1998, Mr. Yalowizer sought a permanent grant of authority to run a meat processing plant on his residential parcel in order to facilitate his brother's purchase and financing of the property. Mr. Lanka, the purported ringleader in the effort to retaliate against Mr. Yalowzier for opposing the paving district, took up Mr. Yalowizer's cause and sought legal advice from Jay Gilbertz, the Town's legal counsel, regarding how Mr. Yalowizer's needs could be met. Mr. Gilbertz first indicated that this issue should be addressed

by special exception rather than by variance Further, the parcel could not be rezoned as that would have constituted illegal spot zoning. Mr. Gilbertz recommended that a special exception under the Town's zoning ordinance was the most legally defensible way to proceed in allowing Mr. Yalowizer to continue his butchering operating in a residential area, though he recommended that any special exception contain the same timing and transfer limitations contained Mr. Yalowizer's variance. Mr. Yalowizer, however, demanded a permanent special exception, a demand that was rejected by the Town at a May 12, 1998 meeting. On June 9, 1998, Mr. Yalowizer's existing variance came up for renewal, and the Town council voted not to renew the variance. Inadvertently, Mr. Yalowizer was given only one day of notice prior to this Town Council meeting, and he did not attend. The Town later gave Mr. Yalowizer an additional opportunity to present his case, but Mr. Yalowizer refused the invitation. Mr. Yalowizer never appealed any of the adverse zoning decisions.

Instead, Plaintiffs David and Joe Yalowizer sued the Town and its mayor under 42 § 1983, claiming that Defendants (1) retaliated against them for speaking out against paving project supported by Town officials, (2) deprived them of their procedural due process rights, (3) deprived them of substantive due process rights, and (4) discriminated *against* them in violation of the Equal Protection Clause. In an August 27, 2000 Order, this Court granted summary judgment in favor of Defendants on all of Plaintiffs' claims except for the free speech retaliation claim, and further granted summary judgment in favor of Defendants on Joe Yalowizer's claim for retaliation, given that he never engaged in any protected free speech activity.

Among the *elements* of a prima facie case of retaliation, Plaintiffs had to show that the Town's actions were motivated, at leas: in part, by an intent to retaliate against Plaintiffs' exercise of their constitutional rights. This Court

denied summary judgment based on David Yalowizer's deposition testimony that the Town's mayor, Brad Lanka, warned him that he was "operating on just a variance" arid that the variance would be "pulled" if he did not pay his pacing assessment. While this Court denied summary judgment, it noted that Plaintiffs' evidence was "weak," arid that "a jury may have to stretch to draw art inference that Defendants retaliated against Plaintiffs *in* response to David Yalowizer's opposition to the paving district." (Order Granting in Part Denying in part Summ. J. at 12.) A jury trial was held September 27 through October 1, 1999. The jury found in favor of Defendants. Defendants now seek attorney fees pursuant to 42 U.S.C. § 1988.

Analysis

"In any action or proceeding to enforce a provision of [42 U.S.C. § 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . ." 42 U.S.C.A. 1988(b) supp. 2000; . In Christiansburg Gar Garment Co. v. EEOC, the Supreme Court held that, while prevailing plaintiffs are awarded fees as a matter of course, prevailing defendants may receive attorneys fees only when the plaintiffs claims were "frivolous, unreasonable, or groundless," or when "the plaintiff continued to litigate after it clearly became so." 434. U.S. 412, 422 (1978). A finding of subjective bad faith is not a prerequisite to an award of fees, though such a finding militates strongly toward such an award. See id. In applying the Christiansburg standard, courts must not "engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." Id. at 421-22.

While it is rare to award fees when summary judgment is denied, denial of summary judgment does not preclude an

award of fees, and is only a factor in deciding whether fees are warranted. See Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993); Grant v. Farnsworth, 869 F.2d. 1149, 1152-53 (8th Cir. 1989). As the Fourth Circuit aptly noted, "[a]lthough in some instances a frivolous case will be quickly revealed as such, it may sometimes be necessary for defendants to 'blow away the smoke screens the plaintiffs had thrown up,'" Introcaso v. Cunningham, 85) F.2d 965, 967 (4th Cir. 1983) (quoting Hicks v. Southern Md. Health Sys. Agency, 805 F.2d 1165, 1167-68 (4th Cir. 1986))

In Hutchinson, for example, the plaintiffs, unsuccessful candidates for federal, state, and local elected offices, alleged a vast election-rigging conspiracy which the court characterized as "worthy of an Oliver Stone screenplay." 994 F.2d at 1078-79. The court explained that,

> [n]ot surprisingly, the district court found it difficult before trial to determine which elements of this theory had some evidentiary foundation, and which were based on mere speculation.. Even so, the court gave plaintiffs ample notice that they were skating on thin ice: In denying defendants' motions dismiss, the court warned plaintiffs that their conspiracy claim had barely survived dismissal. The court gave plaintiffs the benefit of the doubt by allowing their conspiracy claim to go to trial, but this generosity did not negate plaintiffs' responsibility to litigate a factually grounded claim.

Id. at 1081. Consequently, Hutchinson reinstated an award of attorney's fees to the prevailing defendants even though the trial court denied a motion to dismiss and a motion for summary judgment, based on the trial court's conclusion that the plaintiff's case was shown at trial to have been based on

speculation rather than evidence.

As in Hutchinson. the Court's denial of summary judgment in this case cannot shield Plaintiffs from Defendants' motion for attorney's fees. At the summary judgment stage, this determined that there was "weak" evidence of retaliation for David speech. However, the cleansing effect of trial clearly revealed that Plaintiffs had no evidence of retaliation aside from David Yalowizer's speculation. Even it the jury believed Mr. Yalowizer's testimony that Mr. Lanka warned him that the Town would pull his variance it he did not pay the assessment (a doubtful proposition considering Mr. Yalowizer's serious credibility problems), it was abundantly clear that Mr. Lanka's actions were motivated, not by Mr. Yalowizer's speech, but by Mr. Yalowizer's failure to pay the paving assessment Mr. Yalowizer knew or should have known that the First Amendment does not grant the right to refuse to pay a duly levied special assessment.

Equally important, the trial uncovered the fact that, from the time of the events leading to this lawsuit through trial, David Yalowizer and his counsel, John Cotton, were aware of a mountain evidence that the Town's actions were not motivated by an intent to retaliate against Mr. Yalowizer for his speech. Among other information, Mr. Cotton was specifically notified by Jay Gilbertz, the Town's legal counsel, that a special exception rather than a variance was the appropriate means for addressing Mr. Yalowizer's business, and that, under Wyoming law, the Town could grant only a temporary special exception and not a permanent special exception.

In other words, Mr. Yalowizer and his counsel knew from the very beginning that the Town believed it *was not* legally authorized to grant the relief sought by Mr. Yalowizer. As in Hutchinson, Plaintiffs were warned that they barely escaped summary judgment base on "weak" evidence. The Court's

generous (and perhaps regrettable) decision to allow Mr. Yalowizer to present his case to the jury does not eliminate the fact that Mr. Yaowizer pursued this *case* long after he knew or should have known, that he had no competent evidence to prove that the Town retaliated against him for exercising his free speech rights.

Worse yet, in the Court's view this case was never really about Mr. Yalowizer's First Amendment right of free speech. The picture developed at trial confirmed that this case sprang from David Yalowizer's stubborn insistence on having things his way on his terms, everyone else be damned. Both when opposing the special improvement district paving project and when seeking a permanent special exception, Mr. Yalowizer attempted to bully Town officials through threats of lawsuits. The First Amendment claim, brought in a vexatious attempt to punish the Town for failing to bow to Mr. Yalowizer's demands, was the real act of retaliation in this dispute. In sum the frivolous, unreasonable, and groundless character of Plaintiffs' claims, combined with an element of bad faith and vazatiousness, warrant an award of attorney's fees.

Additionally, Mr. Yalowizer's retaliation claim was rendered frivolous by his obvious inability to overcome the Town's affirmative defense under Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), that the Town would have taken the same action regardless of Mr. Yalowizer's opposition to the paving district. See Introcaso, 857 F.2d at 967—68. In Introcaso, the Fourth Circuit addressed a First Amendment retaliation claim brought by a. teacher who asserted that he was disciplined in retaliation for his criticism of the school superintendent's job performance. 857 F. 2d at 966. The superintendent had recommended the plaintiff's discharge after a missing school typewriter was discovered in the plaintiff's wife's store. The trial court denied the superintendent's motion to dismiss as well as his motion for directed verdict made at the close of the plaintiff's case, but

nevertheless awarded attorney's fees under 42 U.S.C. § 1988. The court explained:

> [I]t is possible for a plaintiff to establish a prima facie case which is weak but which is sufficient to survive a directed verdict, but which is nonetheless groundless in light of a defense readily apparent to the plaintiff from the outset of the litigation. . . [The plaintiff and his counsel] knew or should have known, in light of . . . the Supreme Court's decision in Mt. Healthy, that defendants would successfully defend by presenting evidence that they would have undertaken disciplinary action regardless of whether [the plaintiff] had criticized [the superintendent's] job performance.

Id. at 967-68.

Like in Introcaso, this Court allowed David Yalowizer's retaliation claim to go to trial based on weak prima facie evidence of retaliation, though the Court did not address the Town's Healthy affirmative defense at the summary judgment stage. Prior to trial, however, Mr. Yalowizer and his counsel received the affidavits of the Town Council members, each averring that his or her actions were not motivated by an intent to retaliate against Mr. Yalowizer, and, in any case, that each would have voted the same way regardless of Mr. Yalowizer's position art the paving issue. (Walk Aff. ¶ 7; Morris Aff. ¶ 7; Dobrenz Aff. ¶ 7; Johnson Aff. ¶ 9, 10.) They also stated their reasons for voting the way they did, which reasons included the Town's interest in. maintaining control of meat processing business located in a residential area; the Town attorney's legal advice on the zoning issues; and neighbor complaints of dogs dragging carcasses through the surrounding neighborhood, blood being washed down the

street, and Mr. Yalowizer's use of the Town's garbage system for disposal of waste products from his business. (Walk Aff. ¶ 5; Morris Aff. ¶ 5, 12; Dobrenz Aff. S, 16, 22; Johnson Aff. ¶ 8.) Mr. Yalowizer's legal counsel was clearly aware of the Town's concerns regarding a permanent special exception even before the decision denying the permanent special exception was Messrs. Yalowizer and Cotton knew, or should have known, that to have any chance of resisting the Town's Mt. Healthy defense, they would need sortie evidence that Mr. Walk, Mr4 Morris, Mr. Dobrenz, cr Ms. Johnson would not in fact have taken the actions they took in the absence of Mr. Yalowizer's opposition to the paving plan. At triaL, Mr. Yalowizer did not produce a single shred of evidence to that effect, thereby rendering the retaliation claim groundless. See *Introcaso,* 857 F.2d at 968-69. David Yalowizer's continued pursuit of the retaliation claim, done with the knowledge that he had no evidence to counter Defendants' obvious affirmative defense, entitles Defendants to an award of fees under 42 U.S.C. § 1988.

Having concluded that Defendants are entitled to attorney's fees, the Court must fix the amount of the fee award. Defendants'counsel, Torn C. Toner and Rebecca A. Lewis, presented their legal fees by way at affidavit, with detailed billing records and ir!woices attached. Defendants seek a total of $70,906.06. The Court finds that the fees incurred are fair and reasonable. As an initial matter, Ms. Lewis' and Mr. Toner's hourly rates of $110 and $100 per hour, respectively, are exceedingly reasonable for experienced arid highly regarded trial counsel. Moreover, the Court finds that the attorney time spent on the case, slightly more than 500 attorney hours, was a reasonable amount for both pretrial practice and a five-day jury trial with eighteen witnesses. Likewise, the Court finds that the $2,655.00 in paralegal fees and the $13,458.06 in expenses were also reasonable. Consequently, the Court finds that Defendants are entitled to an attorney fee award in the amount $70,906.06. The sole

remaining issue is how the fees should be assessed between the two Plaintiffs, Joe Yalowizer and David Yalowizer. The Court finds merit in Defendants' suggestion that the two Plaintiffs be jointly and severally liable far the fees incurred before August 27, 1999, the date that Joe Yalowizer's claims were dismissed with prejudice. Only David Yalowizer is liable for the fees incurred after that date.

Conclusion

Plaintiffs' claims against Defendants were frivolous, unreasonable, and groundless, and David Yalowizer continued to litigate after it was obvious that he could not prevail. Therefore, Defendants are entitled to an award of attorney's fees pursuant Ca 42 U.S.C. § 1988.

IT IS HEREBY ORDERED THAT Plaintiffs Joe Yalowizer and David Yalowizer are jointly and severally liable to Defendants attorney's fees in the amount of $34,361.90.

IT IS FURTBER ORDERED THAT Plaintiff David Yalowizer is liable to Defendants for an additional attorney fee award of $36,544.16.

Dated this 12th day of June, 2000
CLARENCE A. BRIMMER
UNITED STATES DISTRICT JUDGE

Case No. 98-CV-1063-B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

DAVID A. YALOWIZER and JOE YALOWIZER
Plaintiffs,

vs.

BRAD LANKA, individually, The TOWN OF RANCHESTER, WYOMING, by and through BRAD LANKA, in his official capacity, and by and through the MEMBERS OF THE TOWN COUNCIL, in their official capacity, and the BOARD OF ADJUSTMENT of the Town of Ranchester, by and through its members, in their official capacities,
Defendants.

ORDER GRANTING IN PART AND DENYING IN PART SUMMARY JUDGMENT

This is a civil rights action under 42 U.S.C. § 1983 The Plaintiffs claim that the Town of Ranchester, its officials, and Brad Lanka in his individual capacity[1] improperly denied them the right to operate a meat processing business in 3 residential zone. The Complaint purports to state causes of action for (1) retaliation for the plaintiffs' exercise of free speech, (2) deprivation of procedural due process, (3) deprivation of substantive due process, and (4) violation of equal protection. Plaintiffs claim to have suffered economic loss, mental and emotional distress, and loss of enjoyment of life.

Before the Court today are the remaining Defendants' Motion for Summary Judgment. After reading the briefs, hearing oral

arguments, and being fully advised of the premises contained therein, the Court FINDS and ORDERS as folllows:

Background

Viewed in the light most favorable *to* Plaintiffs, the *relevant* facts are as follows:
The property at the heart of this dispute lies within an R-4 residential zone in the Town of Ranchester. The Town's zoning ordinance provides that: an R-4 zoned property is authorized to have a "home occupation." Plaintiffs David Yalowizer ("David") and his son, Joe Yalowizer ("Joe"), acquired the property in 1992. David used the property both as a residence and as a place to process meat. Initially, David processed meat as a hobby but started charging for his services in 1996. For a while, representatives of the town seemed to have no problems with Plaintiffs' business.

In 1995, the Town was considering a Special Improvement District ("paving district") to pave several of the streets in town. David circulated petitions that opposed the paving district; the paving district was eventually voted downs Then-mayor Susan Lee and Defendant Brad Lanka were upset by David's successful opposition to the paving district.

Following this defeat, Susan Lee first voiced objections to David's business. David consulted with other Town representatives who counseled him to obtain a variance to authorize the use of his property. The Town planning commission recommended limitations be but on David's variance: that the (1) would come up for renewal every two years, and (2) would no longer be in effect if the property was sold. David was concerned about the restrictions but was told by a Town representative not to worry about them. On May 7, 1996, the Town granted David a variance with the restrictions attached.

After David received the variance, the Town proposed another paving district and mailed a notice of hearing on the proposed assessments to he held on May 26, 19964 No one appeared at this hearing to protest the paving district or the assessments; the Town thus adopted the paving district. In response to the adoption of the assessment roll in August 1996, David sent a letter to the Town stating that he could not afford the assessment and would not pay. In discussions between David and Mayor Brad Lanka, David indicated that the assessment was not fair because the paving did not touch David's property. In the fall of 1996, Mayor Lanka allegedly told David that he was "operating on just a variance" and that if he did not pay the assessment, the Town would "pull" the variance.

The Yalowizers continued to operate a meat processing business on the property until late-1997, when David needed sell the property to raise money to pay for legal expenses. MikeYalowizer, David's brother, orally agreed to purchase the property for $125,000, contingent upon Mike being able to use the property as a business. Mike transferred $20,000 to David as security for the deal; Mike attended a Council meeting on January 6, 1993 to request that the restrictions on the variance be removed so he could obtain financing for the property in question. The Council told Mike they would have to speak their attorney as co what procedures they needed to follow. The Council received a letter dated February 10, 1999 from their attorney explaining that a variance was not the appropriate way to allow a purchaser to continue with the meat processing business; a "special exemption" would be more appropriate.

In the meantime, David undertook numerous efforts to obtain resolution to the variance issue, with no success. He requested to rezone the property from a residential to a business zone; the Council denied the request at a meeting David did not attend. At different times, the Town also

denied a request for a special exception and a request that the Town simply remove the limitations on the variance.

David then asked the Council for a formal hearing on his variance and for a two week notice of the hearing. The Council granted the request for a hearing, but only gave David one day's notice. David's attorney was out of town and could not attend.

On June 9, 1998, the Council formally revoked the variance stating that "legal requirements . . . for the variance are not met." According to Mr. Donnie Dobrenz, this Council's finding was based upon representations by Mayor Brad Lanka. (Dobrenz Dep. at 89.)

On June 23, 1998, David appealed the Council's decision; the Council subsequently offered a "supplemental hearing." David declined this offer because he felt the hearing would be futile. Plaintiffs then filed the instant law suit alleging violations of their constitutional rights.

Standards for Summary Judgment

The specific standards for summary judgment are well recognized, and need only be briefly restated. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When applying this standard, the court must examine the factual record and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. See Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir. 1996).

Analysis

A. Procedural Due Process

Procedural due process guarantees apply only to those property interests encompassed by the fourteenth amendment. See Board of Regents v. Roth, 408 U.S. 564, 569 (1972). To sustain their cause of action under section 1993, then, Plaintiffs must first allege a property interest sufficient to warrant due process protection. See Curtis Ambulance, Inc. v. Board of County Comm'rs, 811 F.2d 1371, 1375 (10th Cir. 1987). A protected property interest results from a legitimate claim of entitlement created and defined thy existing rules or understandings that stem from art independent source such as state law." Roth, 408 U.S. at 577. When analyzing whether a plaintiff presents a legitimate claim of entitlement, the Court focuses on the degree of discretion given the decisionmaker and not on the probability of the decision's favorable outcome. See Carey v. Piphus, 435 U.S. 247, 266 (1978). . Plaintiffs must therefore demonstrate that there is a set of conditions the fulfillment of which would give rise to a legitimate expectation that their variance would be renewed. "Otherwise, the City's decisionmaking lacks sufficient substantive limitations to invoke due process guarantees." Jacobs, Visonsi & Jacobs, Co. v. City of Lawrence, 927 F.2d 1111, 1116 (10th Cir. 1991)

Plaintiffs had no legitimate claim of entitlement to the variance. The Council had discretion to review the variance every two years; then was no guarantee that the variance would be renewed. In addition, the variance itself provided that it would not be valid upon a transfer off the base property.[2] Plaintiffs have cited to no "independent source" of existing rules or understandings that would give rise to a legitimate claim of entitlement to the variance. Nor have Plaintiffs demonstrated that they fulfilled a set of conditions

which gave rise to a legitimate expectation that their variance would be renewed. Because there are no substantive limitations on the Council's discretion, Plaintiffs procedural due process claim must fail.

Even if the Court assumes a property interest, Plaintiffs' claims fail because the plaintiffs were granted several opportunities to appear and present their case to the Council but failed to do so. This is all procedural due process requires. See Mathews v. Eldridge, 424 U.S. 319, 333 (1976). Plaintiffs instead chose to file the instant litigation.

Defendants' motion for summary judgment on Plaintiffs' procedural due process is GRANTED and Plaintiffs' claim is DISMISSED WITH PREJUDICE.

B. Equal Protection

According to the Equal Protection Clause of the fourteenth Amendment, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § I. In order to prevail on his equal protection claim, Plaintiffs must show that the Council treated them differently than others "similarly situated . . . and that this different treatment lacked a rational basis." Landmark Land Co. of Okla. v. Buchanan, 874 F.2d 717, 722 (10th Cir. 1999)

Even assuming Plaintiffs have shown that the Council treated them differently than others similarly situated, the Court concludes that the Council had a reasonable basis on which to deny the variance. First, the Council had received complaints from neighbors about the unsanitary conditions of the plaintiffs' operations. (Laya Aff. ¶ 30.) The Town also had reason to be concerned about Mike Yalowizer's alleged expansion of the meat processing business if he were to take over the property. (M. Yalowizer Dep. at 37-38; D. Yalowizer Dep. at 152). These reasons provide a rational and

reasonable basis to support a decision to deny a renewal of the variance. Plaintiffs' equal protection claim is without merit and must be DISMISSED. Defendants' motion for summary judgment on this claim is GRANTED.

C. Substantive Due Process

The Council did not deny substantive due process to plaintiffs. As mentioned above, the plaintiffs had no property right in. the variance because it was wholly within the Council's discretion whether to renew the variance. Even if the Court conceded a property interest, " [a] bsent invidious discrimination, the presence of a suspect class, or infringement of a fundamental interest, courts have limited their review of quasi-legislative or quasi-judicial zoning decisions in the face of a substantive due process challenge to determining whether the decision was arbitrary and capricious." " Jacobs, Visonsi & Jacobs, Co v. City of Lawrence, 927 F.2d 1111, 1119 (10th Cir. 1991) (quotations omitted) . .

The Court is convinced that Plaintiffs have not produced evidence sufficient to demonstrate that the Council violated that standard. The Court *has* found no invidious discrimination, suspect class or fundamental interest. In addition, the Court has found that the Town's decision was not arbitrary and capricious, but had a rational relationship to the Town's interest in maintaining the integrity of a residentially-zoned area. The Town was concerned about the possible expansion of the meat-processing facility arid its current sanitary conditions. These reasons are more than sufficient to deny the variance.

In sum, this Court will not sit as the plaintiffs' "zoning board of appeals." Gunkel v. City of Emporia, 835 F.2d 1302, 1304 (10th Cir. 1987). "When, as here, defendants articulated a rational reason for their decision which is related to a

legitimate government interest, (the Court] will not look beyond it for evidence that the reasans *was* pretext." Norton v. Village of Corrales, 103 F3d 928, 933 *(10th* Cir. 1996). Defendants' motion for suritmary judgement on Plaintiffs' substantive due process claim is thus GRANTED; Plaintiffs' substantive due process claim is necessarily DISMISSED WITH PREJUDICE.[3] .

D. Retaliation for Exercising First Amendment Privileges

Although retaliation is not expressly discussed in the Constitution, it may be actionable inasmuch as governmental retaliation tends to chill citizens' exercise of their constitutional rights. American Civil Liberties Union of Md., Inc. v. Wicomico County, 999 F.2d 780, 785 (4th Cir. 1993) (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)). Any form of official retaliation for exercising one's freedom of speech constitutes an infringement of that freedom. See Smart v . Board of Trustess, 34 F. 3d 432, 434 (7th Cir. 1994).

To prevail On a claim of unconstitutional retaliation in violation of the First Amendment, Plaintiffs must establish the following elements: (1) that plaintiffs were engaged in a constitutionally protected activity; (2) that the defendants' adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of the plaintiffs' constitutional rights. Bloch v. Ribar, 156 F.3d 673, 676 (6th Cir. 1998) An act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper." DeLoach v. Bevers, 922 F.2d 618, 620
(10th Cir. 1990)

Plaintiffs have produced evidence sufficient to create a genuine issue of material fact that (1) Plaintiffs were engaged in the constitutionally protected activity of free speech, (2) *that the* Council's adverse action of denying their variance would likely chill a person from engaging in that activity, and (3) that the denial of the variance was motivated, at least in part, as a response to the Plaintiffs' protestations regarding the paving district. Plaintiffs have produced evidence, albeit weak evidence, that Council members placed undue restrictions upon the variance, the Plaintiffs were reminded that they were "operating on just a variance" and that if they did not pay their paving district assessment that their variance would be "pulled." Although a jury may have to stretch to draw an inference that Defendants retaliated against Plaintiffs in response to David Yalowizer's opposition to the paving district, the Court finds that a reasonable jury could conclude as much.

Consequently, the Court will not grant summary judgment on this claim; Defendants' Motion for Summary Judgment on Plaintiffs' retaliation claim is thus DENIED.[4]

E. Damages

Finally, Defendants argue that David Yalowizer has suffered no damages as a result of the Council's denial of the variance and thus cannot maintain a section 1983 action. The Court finds that Plaintiffs have produced sufficient evidence to create an issue of material fact on the issue of damages. Plaintiffs have shown that Mike Yalowizer, David's brother, made an oral offer to purchase the property in question (with the variance attached) for an amount greater than the amount for which the property eventually sold. There is evidence that Mike Yalowizer confirmed this offer by fronting money to David Yalowizer to pay for David's legal expenses.

The credibility of this evidence *is* not for the Court to determine at this stage. However, Plaintiffs have produced enough evidence to put in dispute the material facts of whether a contract existed between Mike and David Yalowizer Thus, Defendants' motion for summary judgment on this ground is DENIED.

E. Joe Yalowizer's Claims Must Be Dismissed

Joe Yalowizer does not assert retaliation based upon a violation of his own constitutional rights; rather, he alleges retaliation because of his father's exercise of his right of free speech. There is little or no credible evidence in the record that Joe Yilowizer publicly expressed disfavor to the paving district. David Yalowizer made the majority, if not all, of the protected speech at issue in this case. Joe Yalowizer's claims therefore fail because only the individual whose rights have been violated can maintain section 1983 action. See Trujillo v. Board of County Comm'rs, 75S F.2d 1186, 1187 (10th Cir. 1985); Dohaish *v.* Tooley, 670 F.2d *934 (10th* Cir. 1982).

Defendants' Motion for Summary Judgment as to Joe Yalowizer's claims is thus GRANTED and his claims are necessarily DISMISSED WITH PREJUDICE.

Conclusion

For the reasons stated above, David Yalowizer's claim of retaliation for exercising his First Amendment rights survives Defendants' motion for summary judgment. However, summary judgment is GRANTED with regard to Plaintiff David Yalowizer's remaining claims of violations of due process and equal protection; those claims are DISMISSED WITH PREJUDICE. Summary judgment is GRANTED with regard to all of Plaintiff Joe Yalowizer's claims; those claims are also DISMISSED WITH PREJUDICE.

Dated this 27th day of August, 1999.

Clarence A. Brimmer,
U.S. District Judge
JUDGMENT

Footnotes

[1] Plaintiffs indicated in the final pretrial conference held Thursday, August 26, 1999, that they wished to drop their claims against Defendant Lanka in his individual capacity. Per that request, the charges against Defendant Lanka in his individual capacity are DISMISSED WITH PREJUDICE

[2] The plaintiffs now argue that this restriction on the variance is illegal and unconstitutional. The Court need not address that argument today, but wishes to note that plaintiffs did not contest that provision when the variance issued.

[3] The Court also notes that to this day the Town has never ordered the Yalowizers to stop their meat processing operations. Therefore, one could also argue that even if the Yalowizers had a property right to operate a meat processing business in a residential area, the Town has never taken that right away.

[4] The Court wishes to note that Defendants' ripeness and collateral estoppel arguments, while validly argued in the context of Plaintiffs' due process and equal protection claims, are not applicable to Plaintiffs' retaliation claim. An inverse condemnation action need not be brought as a prerequisite to file a retaliation claim. In addition, even if the Council was acting in a judicial capacity, its decision has no preclusive effect when the decision is being attacked on the basis of constitutionally impermissible retaliation. Such a finding would defy both the Court's sense of justice and common sense.

Case No. 98-CV-1063-B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

DAVID A. YALOWIZER and JOE YALOWIZER
Plaintiffs,

vs.

BRAD LANKA, individually, The TOWN OF RANCHESTER, WYOMING, by and through BRAD LANKA, in his official capacity, and by and through the MEMBERS OF THE TOWN COUNCIL, in their official capacity, and the BOARD OF ADJUSTMENT of the Town of Ranchester, by and through its members, in their official capacities,
Defendants.

JUDGMENT

This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict, in finding unanimously that Defendants did not retaliate against Plaintiff for his exercise of his First Amendment right of free speech. It is hereby ORDERED that judgment is entered in favor of Defendants Costs are awarded to Defendants.

Clarence A. Brimmer
United *States* District Judge

Nos. 99-8098 & 00-8047

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID A. YALOWIZER and JOE YALOWIZER,
Plaintiffs-Appellants,

v.

THE TOWN OF RANCHESTER, WYOMING, by and through BRAD LANKA, in his official capacity and by and through the MEMBERS OF THE TOWN COUNCIL, in their official capacity and the TOWN OF RACHESTER BOARD OF ADJUSTMENT,
Defendants-Appellants

ORDER
Filed September 28, 2001

Before EBEL, PORFILIO, and KELLY, Circuit Judges

Appellants' 'Petition for Limited Panel Rehearing Regarding Attorney Fees" is denied.

Entered for the Court
PATRICK FISHER, Clerk of the Court

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XIV, Section 1:

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution, Amendment I:

"Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition government for a redress of grievances."

Civil Rights Act - 42 U.S.C. Section 1983:

"Every person who under color of any an statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

Civil Rights Act - 42 U.S.C. Section 1988(b):

"In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . ."